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Supreme Court of the United States

OCTOBER TERM—1938

No. 309

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

DURKEE FAMOUS FOODS, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO ENLARGE RECORD.

ROGER HINDS,
Counsel for Appellee.

Supreme Court of the United States,

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MOTION TO ENLARGE RECORD.

Now comes Durkee Famous Foods, Inc., defendant in this cause in the United States District Court for the District of New Jersey, which is now pending in this Court on appeal by the above-named Appellant, and respectfully moves that this Honorable Court make its order to enlarge the record herein in the respects hereinbelow specified, and if necessary to that end to issue its writ of certiorari commanding the said District Court to certify and send to this Court a proper and complete transcript of the records so hereinbelow specified.

The aforesaid additional records are as follows:

1. Memorandum opinion of the United States District Court filed January 14, 1937, supporting the order referred to in the plea in bar and answer herein quashing the previous indictment herein (Criminal No. 6821-b).

2. Correcting memorandum opinion of sa
United States District Court filed January 25, 193
correcting the above mentioned opinion (Crimin
No. 6821-b).

3. Motion, including stipulation annexed theret
to quash said previous indictment, filed on or abo
April 3, 1935 (Criminal No. 6821-b) referred to i
the plea in bar and answer herein.

4. Prior indictment herein in said United Stat
District Court returned and filed at the April 19
term of said District Court (Criminal No. 6821-b
though Appellee is ready to stipulate that only par
graph 4 of Count 1, paragraph 1 of Counts 2 to
inclusive, paragraph 3 of Count 6, and paragraph
of Counts 7 to 15 inclusive of said prior indictme
be included in the printed record in this Court.

The following are the reasons and grounds upon whi
Appellee bases this motion:

1. Without the aforesaid records this Court cannot ful
and intelligently consider and determine one of the pri
cipal contentions relied upon by appellee upon its plea i
bar in the District Court, i. e. whether the prior indictme
was quashed because it was "found defective or insufficient
and, therefore, whether the indictment herein is saved fro
the bar of the three-year statute of limitations (18 U. S
Code Sec. 582) by the saving statute, Title 18 U. S. Co
Sec. 587 (May 10, 1934 c. 278, Sec. 1, 48 Stat. 772) provi
ing as follows:

> "Whenever an indictment (prior indictment)
> found *defective* or *insufficient* for any cause, aft
> the period prescribed by the applicable statute
> limitations has expired, a *new* indictment may b
> returned at any time during the next succeedin
> term of court following such finding, during which
> grand jury thereof shall be in session" (The word
> in parenthesis and italics ours).

In order to determine whether or not the prior indictment was "found defective or insufficient" (within the meaning of said saving statute) and hence whether said saving statute applies, it is necessary to examine and consider the above mentioned records, i. e. the opinion supporting the order quashing said prior indictment, the motion and factual stipulation on which said order was based, and so much of said prior indictment as is material to said inquiry.

Defendant-Appellee urged in said District Court herein upon said plea in bar, and will urge in this Court, that said prior indictment was quashed because it appeared by stipulation on the motion to quash that the tariff (which was alleged to have been rebated) contained a vital condition precedent which the prior indictment failed to allege and, therefore, was in a vital respect different from the tariff as alleged in the indictment, so that the ground for quashing said indictment was not that the indictment was "found defective or insufficient" within the meaning of said saving statute, but rather that the Court found that the allegation of the indictment was not supported by the stipulated facts, so that the quashing and dismissal was upon the factual merits rather than for mere insufficiency or defect in form of pleading.

While the District Court did not expressly accept or reject this contention, but, instead, apparently based its order quashing the new indictment solely on the ground that it was returned at the *same* term of court instead of the term next succeeding the term at which the prior indictment was quashed, nevertheless, the contention involves the construction of the Act of May 10, 1934, on which the new indictment is based and should be considered and decided by this Court.

2. The plea in bar herein contains an allegation as to the aforesaid opinion quashing said prior indictment, and the basis therefor, which allegation is denied in the answer of the United States to said plea in bar, and it is necessary

that this Court examine and consider said opinion or said prior indictment, as well as the said motion, stipulation, and prior indictment itself, in order to determine whether or not, for the reason stated above, said saving statute exonerates the present indictment from the bar of the statute of limitations.

3. The Solicitor General has (in his letter dated October 4, 1938) authorized this Appellee to state to this Court that though he does not agree with the contentions of the Appellee, he has no objection to the granting of this motion to enlarge the record.

4. Appellee's excuse for delay in thus moving to enlarge the record is that the praecipe herein was served during the summer vacation, i. e. on July 25, 1938, and it was not until August 31, 1938 that Appellee mailed its counter-praecipe to the United States Attorney with request for acknowledgment of service. On September 12, 1938, said United States Attorney informed Appellee that the rules did not permit him to acknowledge such service, and Appellee thereafter promptly took up with the Clerk and with the Solicitor General the matter of enlarging the record. In the meantime the transcript of the record had already been filed in this Court and it has been suggested that the proper procedure, under the circumstances, is to move to enlarge the record as aforesaid, and for such writ as may be requisite thereto.

Respectfully submitted,

ROGER HINDS,
Counsel for Appellee.